APPENDIX.

Statutes Involved.

An Act in relation to corporations for pecuniary profit, approved June 28, 1919, in force July 1, 1919 (Cahill's Ill. Rev. Stat. 1931, Ch. 32, Secs. 14, 53, 79):

"Sec. 14. All corporations organized under the laws of this State, whose powers may have expired by limitation or otherwise, shall continue their corporate capacity for two years for the purpose only of collecting debts due such corporation and selling and conveying the property and effects thereof. Such corporations shall use their respective names for such purposes and shall be capable of prosecuting and defending all suits at law or in equity."

"Sec. 53. After an adjudication of bankruptcy, or after an execution has been so returned, or has remained unsatisfied for more than ten days, after a demand made, or after dissolution or cessation of business leaving debts unpaid, any creditor may bring suit in equity, in any court having general jurisdiction in the county within which the principal office of the corporation is located on behalf of himself and of all other creditors of the corporation, against all persons who are liable in any way for the debts of the corporation, by joining the corporation in such suit. After exhausting the assets of such corporation, each stockholder may be required to pay his *pro rata* share of such debts and liabilities to the extent of the unpaid portion of the stock and may, in addition thereto, be required to pay his *pro rata* share of not to exceed two weeks unpaid wages of all the employees of the corporation; * * *"

"Sec. 79. The dissolution, for any cause whatever, of any corporation, shall not take away or impair any remedy given against such corporations, its officers, or stockholders, for any liabilities incurred previous to

its dissolution, if suit therefor is brought and service of process had within two years after such dissolution."

An Act to regulate the practice in courts of chancery, approved March 15, 1872, in force July 1, 1872 (Ill. Rev. Stat. 1939, Ch. 22, Sec. 49):

"SEC. 49. Whenever an execution shall have been issued against the property of a defendant, on a judgment at law or in equity, and shall have been returned unsatisfied, in whole or in part, the party suing out such execution may file a complaint against such defendant, and any other person, to compel the discovery of any property or thing in action, belonging to the defendant, and of any property, money, or thing in action due to him, or held in trust for him, and to prevent the transfer of any such property, money or thing in action, or the payment or delivery thereof to the defendant, except when such trust has, in good faith, been created by, or the fund so held in trust has proceeded from, some person other than the defendant himself. The court shall have power to compel such discovery, and to prevent such transfer, payment, or delivery, and to decree satisfaction of the sum remaining due on such judgments, out of any personal property, money, or things in action, belonging to the defendant, or held in trust for him, with the exception above stated, which shall be discovered by the proceedings in chancery, whether the same were originally liable to be taken in execution at law or not: Provided, that no answer made to any complaint filed under this and the preceding section shall be read in evidence against the defendant on the trial of any indictment for fraud charged in the complaint."

Illinois Business Corporation Act of 1933 as amended (Ill. Rev. Stat. 1939, Ch. 32):

"157.86. JURISDICTION OF COURT OF EQUITY TO LIQUIDATE ASSETS AND BUSINESS OF CORPORATION. Courts of equity shall have full power to liquidate the assets and business of a corporation:

"* * *

"(b) Upon the suit of a creditor whose claim has either been reduced to judgment and an execution thereon returned unsatisfied, or whose claim is admitted by the corporation, when in either case it is made to appear that the corporation is unable to pay its debts and obligations in the regular course of business as they mature.

"* * *

"157.94. SURVIVAL OF REMEDY AFTER DISSOLUTION. The dissolution of a corporation either (1) by the issuance of a certificate of dissolution by the Secretary of State, or (2) by the decree of a court of equity when the court has not liquidated the assets and business of the corporation, or (3) by expiration of its period of duration, shall not take away or impair any remedy given against such corporation, its directors, or shareholders, for any liability incurred prior to such dissolution if suit thereon is brought and service of process had within two years after the date of such dissolution. Such suits may be prosecuted against and defended by the corporation in its corporate name."

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1940.

No. 105

RECONSTRUCTION FINANCE CORPORATION,
Petitioner,

vs.

LUCIUS TETER, ET AL.

ANSWER OF CERTAIN RESPONDENTS TO PETITION FOR A WRIT OF CERTIORARI.

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THE GUNTHORP-WARREN PRINTING COMPANY, 310 WEST JACKSON, CHICAGO

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Now come Lucius Teter, John W. O'Leary, Henry H. Hilton, Carol Allen Buckingham and Tracy Wilson Buckingham, as Executors of the Estate of George Tracy Buckingham, Deceased, Samuel M. Hastings, J. W. Marshall, C. H. Fox, individually and as (alleged) stockholders of C. T. C. Investment Company, Joseph Duner and Alice Haven Requa, as Executrix of the Estate of Charles H. Requa, Deceased, respondents in the above entitled cause, and present this their answer to the petition for a writ of certiorari, and in support thereof, respectfully state to the court as follows:

STATEMENT OF FACTS.

Petitioner, on page 3, refers to a certain guaranty. It should be noted that this guaranty was made by C. T. C. Investment Company, *and not by any of the individual defendants* (R. 148-150, Exhibit V).

It should be noted that the indemnity agreement referred to on page 4 as being executed (among others) by the individual defendants, ran to *C. T. C. Securities Company and C. T. C. Investment Company, and to no one else,* and indemnified expressly "against any loss of any nature that may be incurred in connection with any present or future purchases of any of the securities of or any loans to Associated Power and Light Corporation, Union Power and Light Company of Cuba or any committee or corporation in any way allied or affiliated to either of said corporations, and with respect to no other losses." (R. 159, Exhibit VIII).

At the bottom of page 4, Petitioner states "the C. T. C. Investment Company continued to act as a corporation long after its dissolution". This is a misstatement of fact and not contained in any allegation of the amended complaint (hereinafter called "complaint"). As to the remainder of the paragraph, the complaint alleges the dissolution of C. T. C. Investment Company on May 20, 1933, over six years before the filing of this proceeding (R. 125).

Petitioner in the complaint did not, as assignee bringing action in its own name, *on oath*, allege that it is the actual bona fide owner of any non-negotiable chose in action and set forth how and when it acquired title.

The National Bank of the Republic of Chicago assigned, by Exhibit IX, on July 25, 1931, whatever rights under which Petitioner now is claiming, to Chicago Trust Company (R. 160). There is no allegation in the complaint of any loss occurring to C. T. C. Investment Company prior to July 25, 1931.

No proceedings were ever heretofore brought by R. F. C. or by any predecessor assignee against C. T. C. Investment Company or individual defendants with respect to securities or with respect to indemnity agreements.

THE CONTESTED ISSUES.

The complaint was dismissed pursuant to a motion to dismiss which raised numerous defenses thereto (R. 169-178). In the first section of the motion, the issues arise upon the challenge to the jurisdiction of the court, which, it is contended, is without jurisdiction (a) over the subject matter of the suit; and (b) over the defunct C. T. C. Investment Company, named as the principal defendant; and (c) by reason of the insufficiency of service upon the defunct C. T. C. Investment Company; and (d) by reason of Petitioner's failure to state under oath, that it is the actual bona fide owner of any of said choses in action (R. 169-174).

The contested issues in the second section of the motion to dismiss are those which contend that the complaint fails to show a cause of action on which relief sought can be granted (R. 174-178).

Petitioner presents only one question, namely, its so-called "trust fund" doctrine. However, a review of *only* the question presented by the Petition would avail nothing, inasmuch as the order sustaining the motion to dismiss is supported by various basic jurisdictional defects not now presented by the Petitioner. Such basic defects are:

(a) Can Petitioner, as assignee of a non-negotiable chose in action, sue C. T. C. Investment Company on its guaranty made to the National Bank of the Republic of Chicago (Exhibit V, R. 148), when Section 79 of the 1919 Corporation Act of Illinois permits a suit against a corporation for a period of only two years after dissolution; and until loss has occurred to C. T. C. Investment Company does there exist any cause of action in favor of C. T.

C. Investment Company against individual defendants under special indemnity agreement (Exhibit VIII, R. 159)?

(b) Has the court jurisdiction to enter a decree where a necessary party cannot be made a party to the proceedings, namely, can C. T. C. Investment Company, being legally dissolved more than two years prior to the filing of the complaint be made a party defendant?

(c) Does any cause of action exist giving jurisdiction to the court when Petitioner filing suit in its own name as an assignee of a non-negotiable chose in action did not comply with either Section 22 of the Civil Practice Act of 1933 (Illinois Revised Statutes 1939, Chapter 110, Section 146) or with Section 18 of the Practice Act of 1907 (Smith-Hurd Illinois Revised Statutes 1931, Chapter 110, Section 18) which provides as a substantive rule of law that the assignee and owner of a non-negotiable chose in action may sue thereon in his own name, but must in his pleading, on oath, allege that he is the actual bona fide owner thereof and set forth how and when he acquired title? (See appendix for statutes.)

ARGUMENT.

I.

PETITIONER HAS NO CAUSE OF ACTION AGAINST INDIVIDUAL DEFENDANTS UNDER THE SO-CALLED "TRUST FUND" DOCTRINE.

Petitioner seeks a review of the decision rendered below upon the ground that it is in flat contradiction of the Illinois law, with respect to Petitioner's so-called "trust fund" doctrine. An examination, however, of the Court's opinion clearly shows that the court below, on the contrary, followed the Illinois law by refusing to uphold an action in which an alleged creditor prior to judgment and execution against principal debtor corporation and failing to join principal debtor corporation as a party to the proceedings is attempting to sue directly alleged third party debtors of a corporation without complying with either Section 49 of the Chancery Act of Illinois (Ill. Rev. Stat. 1939, Ch. 22, Sec. 49) or Section 14, 53 and 79 of the 1919 Corporation Act of Illinois (Cahill's Ill. Rev. Stat. 1931, Ch. 32) which deal with the subject matter of this case. (See appendix for statutes.)

Further, Petitioner contends that these statutes have no bearing on such a suit as was filed in the instant case and if they do, it creates a serious inroad on the rights afforded creditors of Illinois corporations.

On the contrary, Respondents contend that where the Legislature of a State has enacted clear and unmistakable statutes prescribing an adequate and reasonable cause of action to enforce a creditor's rights, it would be an inroad on justice to permit a creditor recovery when such statutes are completely ignored.

Respondents contend that the jurisdiction of a court to

entertain a suit by a creditor to collect claims against corporations from corporate debtors and from those liable for the corporate debts, arises solely from the specific provisions of the statute under which the corporation was organized and dissolved. That jurisdiction is not conferred by the general equity power of the State.

Wiedoeft v. *Frank Holton & Co.*, 294 Ill. App. 118, 127-8.

Sarelas v. *McCue Co.*, 291 Ill. App. 540, 542-5.

Dukes v. *Harrington & Reidy*, 270 Ill. App. 372, 381-2.

People v. *Shurtleff*, 353 Ill. 248, 260-1.

Blanchard v. *Gay Co.*, 289 Ill. 413, 419-21.

Lequard v. *National Linseed Oil Co.*, 171 Ill. 480, 485.

Consolidated Coal Co. v. *Flynn Coal Co.*, 274 Ill. App. 405, 410-12.

The statute under which C. T. C. Investment Company *was organized* and which was in effect until after it *was dissolved*, was the General Corporation Act of 1919.

Sections 14, 53 and 79 of that Statute are controlling and determinative of the case at bar.

Section 53 is the section of the 1919 Corporation Act which confers jurisdiction of a "creditors" suit, such as the suit at bar, to enforce claims *through* the corporation and *against* those who are allegedly indebted to the corporation, or who are allegedly liable for its debts.

That section can be invoked after the dissolution of the corporation leaving debts unpaid *only* by (a) a creditor; and (b) *by making the dissolved corporation a party defendant*. However, that jurisdiction to join the corporation as a party defendant extends for a period of only two years after dissolution and is terminated at that time by Section 79 of the 1919 Corporation Act.

Section 79 provides that for a period of *two years* after

dissolution, the corporation, its officers and stockholders, may be sued on any pre-existing cause of action (including, of course, a suit based on Section 53) but that after the expiration of the two year period, no suit of any kind, by anybody, on any cause of action, may be brought *against the corporation, or its officers or its stockholders.*

Section 14 provides that for a period of two years after dissolution, a corporation may, in its own name, liquidate its assets and collect from those who are indebted to it and for those purposes only, may sue or be sued. After such termination, the corporation *cannot sue on any cause of action.*

This two year period under Sections 14 and 79 is not a statute of limitation—it is a condition precedent to any right *by, through, or against the corporation, or its officers, or its stockholders.*

Dukes v. *Harrison & Reidy*, 270 Ill. App. 372, 379.
Sarelas v. *McCue Co.*, 291 Ill. App. 540, 545.
Bishop v. *Chicago Rys. Co.*, 303 Ill. 273, 276-7.

Section 53 is the only authority for a "creditor's" suit and requires, as a *"sina qua non"* that the corporation be joined as defendant. Sections 14 and 79 prohibit any suit being brought after the two year period by or against the corporation, or through the corporation. C. T. C. Investment Company was dissolved over six years prior to the commencement of this suit and cannot now sue or be sued and cannot now be made a party to this suit. Thus Petitioner is not able to comply with any of these requirements and this suit must fail for want of the Court to have jurisdiction to entertain it.

Dukes v. *Harrison & Reidy*, 270 Ill. App. 372, 379-80.
Consolidated Coal Co. v. *Flynn*, 274 Ill. App. 405, 410-12.
Chicago Title & Trust Company v. *Forty-one Thirty-six Wilcox Corporation*, 302 U. S. 120, 124.

Respondents further contend that aside from actions brought pursuant to the said above sections of the 1919 Corporation Act, any other action brought by a creditor in equity to recover from third party debtors must be brought in compliance with Section 49 of the Chancery Act of Illinois.

Spindle, Assignee v. *Shreve*, 111 U. S. 542, 546-47; 28 L. Ed. 572; 4 S. Ct. 522.

Potter v. *Couch*, 141 U. S. 296, 319-20; 36 L. Ed. 721; 11 S. Ct. 1005.

Ladd v. *Judson*, 174 Ill. 344, 349-51.

However, in order to comply with that section, it is necessary to make the principal debtor a defendant. Further, that section requires that a judgment be first obtained against the debtor with the return of execution unsatisfied in whole or in part. So again, under Section 49, Petitioner is met by the obstacle that the provisions of Section 79 of the 1919 Corporation Act preclude the joining of C. T. C. Investment Company, as principal debtor, and the obtaining of a judgment against C. T. C. Investment Company and, therefore, preclude complying with the conditions laid down by Section 49 of the Chancery Act as a prerequisite to a cause of action.

As to the cases cited on page 7 of Petitioner's brief to sustain its so-called "trust fund" theory, it must be noted that all of those cases were decided prior to the 1919 Illinois Corporation Act.

Prior to 1919, the statute extending the time after dissolution within which suits could be brought against the corporation, its officers or stockholders, *was without time limit.* (*Singer* v. *Hutchinson*, 176 Ill. 48, 51.) The 1919 statute, by Section 79, shortened that post mortem period *to two years.*

Further comments on said cases are:

(1) *Hill* v. *Gruell*, 42 Ill. App. 41 (1891).

Petitioner states (page 9) that this case specifically held that the statutes were not exclusive. This is misleading. This case was decided in 1891, years prior to the 1919 Corporation Act, and was in the nature of a *creditor's bill* seeking recovery upon a *judgment* which Plaintiff had obtained against the corporation *prior* to the bringing of this action. In view of subsequent cases, the most that can be said of some of the language quoted is that it is unusual dictum, but not the law. As far as we can find, this case was never cited in any subsequent case.

(2) *Singer* v. *Hutchinson*, 183 Ill. 606 (1900).

This was a creditor's bill based on a *judgment* obtained against corporation on claim existing prior to dissolution.

(3) *Clarkson* v. *E. & N. S. Dispatch*, 6 Ill. App. 284 (1880).

Again, creditor's bill based upon *judgment* rendered.

(4) *Wheeler* v. *Pullman Iron & Steel Co.*, 143 Ill. 197, 204 (1892).

Bill filed to dissolve corporation, appoint receiver, asking for an accounting, and to marshal and distribute assets after payment of debts. Facts alleged did not bring bill within Section 25 of the Corporation Act. *Court held Section 25 must be complied with as court had no jurisdiction under general equity powers to grant relief prayed for, as Section 25 was exclusive in governing corporations.*

(5) *Tarbell* v. *Page*, 24 Ill. 46, 47 (1860).

Plaintiff brought suit against stockholders under individual liability clause of the general manufacturing law of 1849. Act provided no stockholder shall be personally liable for corporate debt which was not paid within one year from time it became due, *unless suit for collection be*

brought against corporation within one year from the time it became due.

Suit was not brought within proper period and court sustained demurrer as holding compliance with act essention to cause of action.

(6) *Life Association of America* v. *Fassett*, 102 Ill. 315, 323 (1892).

Plaintiff sued out an attachment three days before corporation was dissolved. Receiver of assets of dissolved corporation attempted to defeat lien created by attachment. Court held sections of Corporation Act then in force permitted corporations, after dissolution, to exist for the purpose of settling up affairs and having their property applied for the payment of just debts, and that the corporation still existed for the purpose of enforcing the attachment lien.

(7) *City Insurance Co.* v. *Commercial Bank*, 68 Ill. 340 (1873).

This case holds that where a Rhode Island Bank has forfeited its charter to the State of Rhode Island, action may be maintained in Illinois against property located in Illinois for the payment of its debts.

(8) *Clapp* v. *Peterson*, 104 Ill. 26 (1882).

Plaintiff, Peterson, sold property to corporation. Plaintiff later filed bill to set sale aside for fraud and obtained a *money decree*. After execution issued, having been returned *nulla bona*, plaintiff filed bill in chancery to subject property in possession of defendant, Clapp, to payment of decree.

Clapp had previously received corporate property in exchange for surrender of stock of corporation. Court held that property so received by Clapp was subject to payment of debt of plaintiff.

(9) *Henry* v. *Jewett*, 94 Ill. App. 667 (1900).

This case was a creditor's bill seeking payment of a certain *judgment* against a corporation from the principal stockholder of the corporation who had received all of the proceeds of the sale of the assets of the corporation.

The most that can be said of said doctrine as construed by the Illinois cases so cited, is that equity does not permit corporate assets to be appropriated by stockholders to themselves where the corporation is insolvent, or would be made insolvent thereby, or where corporate debts are left unpaid, but this only to the extent of the corporate assets so received. The basis is that of legal fraud in appropriating assets which should have gone to pay debts. *The theory, however, never extended to permit creditors to sue directly third party debtors* of the corporation, and all of the cited cases were cases in which a creditor had previously obtained a judgment against the corporation or had perfected a lien upon its assets, or had complied with the then corporate statutes, none of which had Petitioner, nor any former assignee, done in this case.

The following cases construing the Illinois statutes are controlling of the subject matter:

Chicago Title & Trust Company v. *Forty-one Thirty-six Wilcox Corporation*, 302 U. S. 120.

Wiedoeft v. *Frank Holton & Co.*, 294 Ill. App. 118, 127-9.

Dukes v. *Harrison & Reidy*, 270 Ill. App. 372, 380-1.

Consolidated Coal Co. v. *Flynn Coal Co.*, 274 Ill. App. 405, 410-12.

Sarelas v. *McCue Co.*, 291 Ill. App. 540, 542-5.

People v. *Shurtleff*, 353 Ill. 248, 260-1.

Blanchard v. *Gay & Co.*, 289 Ill. 413, 419-20.

Coquard v. *National Linseed Oil Co.*, 171 Ill. 480, 484.

A. J. Bates v. *United States*, 3 Fed. Supp. 245.

Charles A. Zahn Co. v. *United States,* 6 Fed. Supp. 317.

National Bureau, etc. v. *Tax Service Ass'n.,* 290 Ill. App. 152, 157-8.

In the case of *Dukes* v. *Harrison & Reidy,* 270 Ill. 372, the opinion states at pages 378-9:

> "The defendant corporation contends that section 14 of the Corporation Act is not a statute of limitation of action, and that neither paragraph 26 nor any other section of the Limitations Act refers to or is applicable to sections 14 or 79 of the Corporation Act; that section 14 places a definite limit on corporate capacity to sue and be sued; that it provides that corporations whose powers have expired by limitation or otherwise shall continue their corporate capacity for two years for the purpose only of collecting debts due such corporations and selling and conveying the property and effects thereof and for such purpose may prosecute or defend all suits in the corporate name; that after that period of two years has expired the corporation is legally dead for all purposes and that there is nothing in any provision of the Limitations Act which revives it for any purpose; that it has no corporate capacity of any kind, no officers or agents, and therefore cannot be sued or brought within the jurisdiction of the court by the delivery of a summons to one of its former officers."

The court sustained this contention. After holding that the corporation in that case (which had been dissolved more than two years) had no capacity to sue or be sued, because of Sections 14 and 79, the court said (pp. 381-2):

> "The defendants further contend that if the contention that the defendant corporation cannot legally be made a party defendant to this suit is held to be meritorious then the entire case of complainant falls because of section 53 of the Corporation Act, Cahill's St. ch. 32, § 53, which makes it necessary to join the corporation as a party defendant. *The right of creditors to bring a suit of this nature is conferred by sec-*

tion 53 of Chapter 32, which provides that the corporation shall be made a party defendant. The complainant creditor must bring her suit within the provisions of that section if she wishes to avail herself of the remedy provided therein. *Section 53 of the Corporation Act must be construed with sections 14 and 79 of the same act,* and it is apparent that complainant cannot avail herself of the remedy provided by this statute for the reason that her bill of complaint was not filed until September 14, 1931, which was more than two years after the dissolution of the corporation."

On page 11 of the Petition, it is stated that "When Section 79 refers to the liabilities of officers and stockholders, it would seem only to mean their statutory liabilities. Cf. *Consolidated Coal Company* v. *Flynn Coal Co.*, 274 Ill. App. 405."

It should be noted that on page 409 of the opinion in the case above referred to, a proposed amended bill of complaint was tendered to the court, which proposed bill of complaint set out the various statutory liabilities contained in the original complaint, and in addition set forth various illegal acts of the president of defendant Coal Company not covered by statutory liability. The court denied leave to file the proposed amended bill of complaint on the same grounds it dismissed the original bill of complaint, namely, that Section 79 of the Corporation Act applied to all of the allegations in both the original complaint and the proposed amended bill of complaint.

On page 10 of the Petition, it is stated "The rule of *Hill* v. *Gruell* has not been qualified and is reinforced by other Illinois decisions holding that Section 49 of the Chancery Act is not exclusive. *Eads* v. *Mason*, 16 Ill. App. 545, 547, 548; *Steere* v. *Hoagland*, 39 Ill. 264, 265-267; *McDowell* v. *Cochran*, 11 Ill. 31, 33; *Blair* v. *Illinois Steel Co.*, 159 Ill. 350, 358-360."

These cases are far afield from the case at bar. The

first three of these cases were expressly governed by the Statute of Wills. The last case, the court held, involved the same principal and was an exception to the general rule. In the case of *Eads* v. *Mason,* it was held that the requirement that an execution must issue on judgment and be returned unsatisfied before a court of equity will entertain a bill to reach assets of the judgment debtor was *waived by statute of wills where the assets of the judgment debtor were held by an administrator of the debtor's estate.* The case of *Steere* v. *Hoagland* also involved an administrator of a debtor's estate. Also, the case of *McDowell* v. *Cochran* involved an administrator of a debtor's estate. Further, in the case of *Blair* v. *Illinois Steel Co.,* the debtor corporation was insolvent and all of its property was in the hands of a receiver in a suit in equity brought under Section 25 of the then Corporation Act. The court, in this case, held that where property was in the hands of a receiver, the case was one of an exception to the general rule that there must be a return of *nulla bona* upon which to base the right of a creditor to contest, in equity, the transfer of property made by the debtor.

II.

PETITIONER AS ASSIGNEE OF A NON-NEGOTIABLE CHOSE IN ACTION, CANNOT SUE C. T. C. INVESTMENT COMPANY (BY VIRTUE OF SECTION 79 OF 1919 CORPORATION ACT) ON ITS GUARANTY MADE TO THE NATIONAL BANK OF THE REPUBLIC OF CHICAGO (EXHIBIT V) AND UNTIL LOSS HAS OCCURRED TO C. T. C. INVESTMENT COMPANY NO CAUSE OF ACTION COULD HAVE ARISEN IN FAVOR OF C. T. C. INVESTMENT COMPANY AGAINST INDIVIDUAL DEFENDANTS UNDER SPECIAL INDEMNITY AGREEMENT (EXHIBIT VIII).

Petitioner, on page 5, states that "In 1939 to recover upon the guaranties of the aforesaid notes pledged by the bank (R. 126-127), * * * Petitioner filed suit in the District Court (R. 2, 110)".

Respondents contend that no cause of action can exist with respect to guaranty agreement (Exhibit V) because Petitioner, even if vested with all the rights of The National Bank of the Republic of Chicago must assume also the burdens and could not have brought any action with respect to the guaranty against C. T. C. Investment Company. Such Company was dissolved in 1933, more than six years prior to the filing of Petitioner's action. Again, Section 79 of the 1919 Corporation Act, limiting such cause of action to two years after the date of such dissolution, bars any such action.

Further, if C. T. C. Investment Company now sued on the special indemnity agreement between it and the individual defendants, defendants could defeat the suit by invoking Section 14 of the 1919 Corporation Act.

The same defenses would be available to individual defendants against Petitioner in any suit in which Petitioner bases its action against, by or through C. T. C. Investment Company.

Alexander H. Revell & Co. v. *C. H. Morgan Grocery Co.*, 214 Ill. App. 526, 528-9.

Gallopin v. *Continental Casualty Co.*, 290 Ill. App. 8, 13.

Herzon v. *Eisenstein*, 294 Ill. App. 265, 271-4.

Further, at the time The National Bank of the Republic assigned on July 25, 1931, by Exhibit IX, whatever interests it might have had in said Exhibits V and VIII, it could only assign a then existing cause of action, said Exhibits being non-negotiable choses in action. There is no allegation in the complaint, not even by way of conclusion, much less of a purchase and sale, of any loss to C. T. C. Investment Company occurring prior to July 25, 1931. Any loss after that, if one had occurred, and any

cause of action subsequently arising with respect to said loss, would not have passed to Petitioner.

State Street Furniture Co. v. *Armour & Co.*, 259 Ill. App. 589, 593.

Peoples National Bank v. *Cosden*, 283 Ill. App. 31, 38-9.

Stern v. *Gelder*, 224 Ill. App. 89, 91-2.

III.

COURT HAS NO JURISDICTION TO ENTER A DECREE WHERE C. T. C. INVESTMENT COMPANY, BEING LEGALLY DISSOLVED MORE THAN TWO YEARS (ACTUALLY SIX YEARS) PRIOR TO THE FILING OF THE COMPLAINT, CANNOT BE MADE PARTY DEFENDANT, AS C. T. C. INVESTMENT COMPANY IS A NECESSARY PARTY TO THE PROCEEDINGS.

C. T. C. Investment Company was dissolved some six years prior to the institution of these proceedings. By virtue of Section 79 of the Corporation Act, which permits suits against a dissolved corporation to be brought for a period of only two years after such dissolution, C. T. C. Investment Company cannot be a party to this suit, or any other suit. However, C. T. C. Investment Company, by virtue of the prayer of the complaint in this cause, must be joined as a necessary party.

It is a basic principle of equity that anyone who has an interest in the subject matter of a suit in equity is a necessary party; and that in the absence of a necessary party, the court will not enter a decree affecting that subject matter. If this were a separate suit against these indemnitors based on these premises of law and fact, the C. T. C. Investment Company is a party who has an interest in the subject matter. Indeed, on the face of the complaint, it has the only direct legal interest.

If such a suit had been brought in the lifetime of this corporation, or within two years after its dissolution and

it had not been made a party, the suit would have been dismissed when the court discovered (or even on its own motion) that a necessary party was not before the court.

Swan Land & Cattle Co. v. *Frank,* 39 Fed. 456-60.
Minnesota v. *Northern Securities Co.,* 184 U. S. 199, 246-7.
Schumacher v. *Klitzing,* 353 Ill. 530, 532-4.
Mortimore v. *Bashore,* 317 Ill. 535, 540-41.

IV.

COURT LACKS JURISDICTION AS NO CAUSE OF ACTION EXISTS ON COMPLAINT BROUGHT IN NAME OF ASSIGNEE OF NON-NEGOTIABLE CHOSE IN ACTION WHEN PETITIONER FAILED TO COMPLY WITH SECTION 18 OF THE 1907 ILLINOIS PRACTICE ACT AS AMENDED JULY 6, 1925 OR SECTION 22 OF THE ILLINOIS CIVIL PRACTICE ACT OF 1933.

Paragraph 39 of the complaint alleges that Petitioner "as the holder as assignee of said agreements and as assignee of the causes of action against the defendants named herein, and each of them, arising out of the agreements referred to herein, is the real party in interest in these proceedings * * *".

Petitioner brings this suit in its own name. The complaint is not sworn to nor is any affidavit of Petitioner, or anyone, attached thereto.

An assignee of a chose in action which is not a negotiable instrument by common law has no right to bring an action in his name based on the assigned chose in action. "He has no cause of action."

Illinois, in 1907 for the first time, by statute gave to an assignee of a chose in action the right to have a cause of action in his name. In 1933, the 1907 statute was replaced by a new statute, both, however, being substantially alike.

These statutes required that the pleading show that

plaintiff is the actual bona fide assignee and *owner*, and how and when he acquired title and *this he must show in a pleading under oath.* (See appendix for statutes.)

If his complaint is not under oath, or if under oath it fails to show that plaintiff is the actual bona fide owner of the chose in action and has "acquired title and ownership of it", then the plaintiff has no "cause of action". It is *not* that plaintiff in such case has a defective cause of action—*he has no cause of action.*

In the case at bar, the complaint is not sworn to and if it were, it fails to show bona fide ownership in Petitioner, as complaint states agreements were held as "collateral security" and not as bona fide owner. The "right, title and interest", by assignment (if any), is in the Receiver of Central Republic Trust Company—*not* in Petitioner.

N. G. Taylor v. *Anderson,* 275 U. S. 431, 438-9.
Gallagher v. *Schmidt,* 313 Ill. 40, 43-4.
Allis-Chalmers Mfg. Co. v. *Chicago,* 297 Ill. 444, 449-50.
U. S. v. *R. B. McDanel Co.,* 16 Fed. Supp. 905, 908.

Conclusion.

Wherefore, it is respectfully submitted that the petition for a writ of certiorari should be denied.

Vincent O'Brien,
Tracy Wilson Buckingham,
Attorneys for Lucius Teter and Certain Other Respondents.

Vincent O'Brien,
Attorney for Carol Allen Buckingham and Tracy Wilson Buckingham, Executors of the Estate of George Tracy Buckingham, Deceased, Respondents.

APPENDIX.

An Act in relation to corporations for pecuniary profit, approved June 28, 1919, in force July 1, 1919 (Cahill's Ill. Rev. Stat. 1931, Ch. 32, Secs. 14, 53, 79):

SEC. 14. "All corporations organized under the laws of this State, whose powers may have expired by limitation or otherwise, shall continue their corporate capacity for two years for the purpose only of collecting debts due such corporation and selling and conveying the property and effects thereof. Such corporations shall use their respective names for such purposes and shall be capable of prosecuting and defending all suits at law or in equity."

* * * * *

SEC. 53. "After an adjudication of bankruptcy, or after an execution has been so returned, or has remained unsatisfied for more than ten days, after a demand made, or after dissolution or cessation of business leaving debts unpaid, any creditor may bring suit in equity, in any court having general jurisdiction in the county within which the principal office of the corporation is located on behalf of himself and of all other creditors of the corporation, against all persons who are liable in any way for the debts of the corporation, by joining the corporation in such suit. After exhausting the assets of such corporation, each stockholder may be required to pay his *pro rata* share of such debts and liabilities to the extent of the unpaid portion of the stock and may, in addition thereto, be required to pay his *pro rata* share of not to exceed two weeks unpaid wages of all the employees of the corporation; * * *."

* * * * *

SEC. 79. "The dissolution, for any cause whatever, of any corporation, shall not take away or impair any remedy given against such corporations, its officers, or stockholders, for any liabilities incurred previous to its dissolution, if suit therefor is brought and service of process had within two years after such dissolution."

An Act to regulate the practice in courts of chancery, approved March 15, 1872, in force July 1, 1872 (Ill. Rev. Stat. 1939, Ch. 22, Sec. 49):

SEC. 49. "Whenever an execution shall have been issued against the property of a defendant, on a judgment at law or in equity, and shall have been returned unsatisfied, in whole or in part, the party suing out such execution may file a complaint against such defendant, and any other person, to compel the discovery of any property or thing in action, belonging to the defendant, and of any property, money, or thing in action due to him, or held in trust for him, and to prevent the transfer of any such property, money or thing in action, or the payment or delivery thereof to the defendant, except when such trust has, in good faith, been created by, or the fund so held in trust has proceeded from, some person other than the defendant himself. The court shall have power to compel such discovery, and to prevent such transfer, payment, or delivery, and to decree satisfaction of the sum remaining due on such judgments, out of any personal property, money, or things in action, belonging to the defendant, or held in trust for him, with the exception above stated, which shall be discovered by the proceedings in chancery, whether the same were originally liable to be taken in execution at law or not: Provided, that no answer made to any complaint filed under this and the preceding section shall be read in evidence against the defendant on the trial of any indictment for fraud charged in the complaint."

SECTION 18 OF PRACTICE ACT OF 1907, AS AMENDED JULY 6, 1925.

"18. The assignee and bona fide holder of any chose in action not negotiable, heretofore, or hereafter assigned, may sue thereon in his own name, and he shall in his pleading on oath, or by his affidavit, where pleading is not required, allege that he is the actual bona fide owner thereto, and set forth how and when he acquired title; but in such suit there shall be allowed all

just set-offs, discounts and defenses, not only against the plaintiff, but also against the assignor or assignors, before notice of such assignment shall be given to the defendant; * * *."

SECTION 22 OF CIVIL PRACTICE ACT OF 1933.

"The assignee and owner of a non-negotiable chose in action may sue thereon in his own name, and he shall in his pleading on oath, allege that he is the actual bona fide owner thereof, and set forth how and when he acquired title; but such action shall be subject to any defense or set-off existing before notice of the assignment; * * *."